IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1948~~ 1949

No. ~~694~~ 47

COLGATE-PALMOLIVE-PEET COMPANY,
Petitioner,

vs.

THE NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INTERNATIONAL CHEMICAL WORKERS UNION, A. F. L., et al.,
Intervenors,

and

WAREHOUSE UNION LOCAL 6, INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION (CIO),
Intervenor.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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Subject Index

Table of Authorities Cited

Statutes

Miscellaneous

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To the Honorable Fred N. Vinson, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Colgate-Palmolive-Peet Company, a corporation, hereinafter called "Petitioner", respectfully prays

that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Ninth Circuit, rendered on January 13, 1949 (R. IV, 997).[1] A petition for rehearing was denied on February 4, 1949 (R. IV, 997). The said judgment affirmed an order and decision of The National Labor Relations Board, hereinafter referred to as "Board", dated September 6, 1946 (R. I, 68-85). The case was brought to the United States Court of Appeals for the Ninth Circuit under the provisions of the National Labor Relations Act, 29 U.S.C.A. Sec. 160 (f), prior to its amendment by the Labor Management Relations Act, 1947.

OPINION BELOW.

The order and decision of the Board is reported in 70 N.L.R.B. (F.) 1202. The opinion of the United States Court of Appeals for the Ninth Circuit, as yet unreported, is attached hereto as Appendix "A". This opinion is contained in the record in Volume IV, at pages 990 to 992, inclusive.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a), Judicial Code, as amended, 28 U.S.C.A. 1254 (1), and Section 10 (f) of the National

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[1] "R" refers to the printed transcript of records. The Roman numerals preceding the comma refer to the volume of the printed record in which the reference appears. The Arabic numerals following the comma refer to the pages of the volume of the printed record in which the reference appears.

Labor Relations Act, 29 U.S.C.A. 160(f) as amended by the Labor Management Relations Act, 1947. Petitioner also relies on Rule 38, Paragraph 5(b) of this Court for its grounds upon which this petition is made.

STATUTES.

The statutes involved are the following:

(1) The National Labor Relations Act, 29 U.S.C.A. 151, et seq., especially 29 U.S.C.A. 158 (3).

(2) The Labor Management Relations Act, 1947, 29 U.S.C.A. 151, et seq., especially 29 U.S.C.A. 158(a)(3), 158(b)(1), 158(b)(4) and 160(f).

(3) The Administrative Procedure Act, 5 U.S.C.A., Section 1001 et seq., especially Section 1009 (e).

Pertinent sections are set out in Appendix "B".

STATEMENT OF THE MATTER INVOLVED IN THIS PETITION.

This case arose out of a complaint issued by the Board charging the Petitioner with unfair labor practices (R. I, 4-10), and involves the discharge by Petitioner of thirty-seven of its employees as a result of demands therefor made, under the terms of a valid closed shop contract (R. I, 69; R. III, 787-788), by Warehouse Union Local 6, International Longshoremen's & Warehousemen's Union (CIO), hereafter referred to as the "CIO" (R. I, 178-179;

R. II, 521-525; R. III, 784-785; R. II, 527-528; 545; R. III, 846-847; R. I, 46; R. III, 806-807; R. II, 654-656; R. III, 733-734; 736; R. I, 50 and Note 20; R. III, 806; R. II, 654-656). The CIO was the bargaining representative of Petitioner's employees. With the exception of two, all of these employees had been members of the CIO (R. II, 641; 650). All but six[2] of the employees had, prior to their discharge, resigned, in mass, from the CIO (R. I, 70; 257; R. III, 786-787), and all of them without exception had participated in a strike not authorized by the CIO (R. I, 71-72; 257-258; R. II, 506-507). At the time these events occurred the war with Japan was still in progress, and the CIO had given a pledge not to engage in strikes during this period (R. II, 420-421; R. I, 258; R. II, 506-507). At the time that the employees resigned from the CIO and engaged in the strike, they were advocating a change of bargaining representatives and had formed the Colgate-Palmolive-Peet Company Employees' Welfare Association, hereinafter called the "Association", and were looking forward to affiliating with the International Chemical Workers Union, A.F.L., hereinafter referred to as "A.F.L.", (R. I, 256-258; R. II, 506-507).

The record of this proceeding discloses no history of hostility on the part of Petitioner to the organization of its employees. There is not involved in this case, as there was in *Wallace Corporation v. N.L.R.B.*, 323 U.S. 251, 89 L. Ed. 216, any question of domina-

[2]Including the two who were not members of the CIO.

tion by the employer of a labor organization or of collusion or conspiracy between the employer and a group of employees to deprive other employees of the rights guaranteed to them by Section 7 of the National Labor Relations Act (29 U.S.C.A. Sec. 7).

Petitioner's employees were first organized in 1936. At that time and for approximately two years thereafter, the I.L.A., affiliated with the American Federation of Labor, was the bargaining agent for said employees. Subsequently, on or about 1938, the employees shifted their allegiance from the I.L.A. to the CIO. The CIO is now and has been since 1938 the bargaining agent for Petitioner's employees in the proper bargaining unit (R. I, 286; R. II, 625; R. I, 23). On or about July 9, 1941, the CIO entered into a collective bargaining agreement with Petitioner (R. III, 787). This contract is of indefinite duration. Section 3 thersof provides as follows:

> "Section 3. The Employer agrees that when new employees are to be hired to do any work covered by Section One (1), they shall be hired through the offices of the Union, provided that the Union shall be able to furnish competent workers for work required. In the event the union is unable to furnish competent workers, the Employer may hire from outside sources, provided that employees so hired shall make application for membership in the Union within fifteen (15) days of their employment. *The employees covered by this agreement shall be members in good standing of the Union and the Employer shall employ no workers other than members of the Union subject to conditions herein above prescribed.* In the

hiring of new help (for the warehouses), they shall be hired through the offices of the Warehouse Union, Local 1-6, I.L.W.U." (Italics ours.) (R. III, 787-788; R. I, 222-223.)

The contract was amended and extended on July 24, 1945, subject to the approval of the War Labor Board (R. III, 788-790; R. I, 69).

The Board admits and found that this contract was made in compliance with the conditions set forth in the proviso of Section 8 (3) of the National Labor Relations Act (29 U.S.C.A. Section 158 (3)), which permits an employer to make a closed shop contract with a bona fide majority Union covering an appropriate unit (R. I, 69).

On demands of the CIO under the terms of the above quoted provisions of the collective bargaining agreement, Petitioner discharged the above mentioned employees. At the time that these demands were made, Petitioner was advised by the CIO that the discharged employees had been suspended from membership.

The events out of which this case arises occurred between July 20, 1945 and October 16, 1945. During that period, Petitioner was manufacturing glycerine at its Berkeley, California, plant for war purposes and was producing between four and five hundred thousand pounds per month (R. II, 559). The Petitioner then employed approximately 313 non-supervisory employees (R. II, 422). At that time, the CIO had pledged to the President and the nation "that until the war is ended, with the unconditional sur-

render of Japan, we will not strike, stop work, or cease or slow production for any reason whatsoever." (R. II, 420-421). In addition, the CIO had taker a strong stand against racial discrimination.

The management of Petitioner had known, for some time prior to July 26, 1945, that five of the employees subsequently discharged, who were CIO shop stewards at Petitioner's plant, had been accused of working against the established policies of the CIO, including the CIO's policy against racial discrimination. Information had also come to Petitioner's management of the fact that the stewards had been accused of being remiss in carrying out their duties of office in other particulars (R. III, 725-726; 763-768).

The salient and material facts disclosed by the printed record which consists of 998 pages, may be summarized as follows:

1. On July 26, 1945, twenty-eight to thirty employees, including the five stewards mentioned above, held a meeting to formulate plans to withdraw from the CIO, form the Association and to affiliate with a Local of a strong International. It was stipulated that Petitioner had no knowledge that this meeting was being held (R. I, 189-190; 260-261; 286-287; R. II, 408-409; R. I, 255).

2. On July 28, 1945, one of the stewards, pursuant to plans formulated at the above-mentioned meeting, posted notices at the plant of a meeting to be held on July 30, 1945 for all those interested in joining the Association. The notices did not disclose the purpose

of the meeting. The notices were called to the attention of Petitioner's Labor Relations Manager, but he did not associate the organization mentioned therein with one intended for collective bargaining purposes (R. I, 191-192; 213; R. III, 668; 721-722).

3. Prior to the holding of the announced meeting, one of the stewards, accompanied by one of the subsequently discharged employees, solicited and obtained from Petitioner's management a "lay-off" of two hours to enable the night shift employees to attend the meeting. There is no evidence that anyone informed Petitioner's representatives of the purpose of the meeting (R. I, 268-269).

4. On July 30, 1945, a few hours prior to the time announced for the meeting, five officers of the CIO called upon Petitioner's management representatives and delivered to them a letter, advising that charges had been preferred against the five stewards by the Union and that the men had been suspended from membership. The letter also contained a request that the stewards be immediately removed from the job until the charges had been determined by the CIO (R. III, 668-669; 784-785; R. I, 259). Petitioner's representatives protested the request, but the CIO officers called to their attention that under the terms of the agreement they had no alternative but to comply with the demand. The stewards were summoned, while the CIO officers were still present, and advised of their dismissal. At that time Petitioner's representatives received no information as to the reason underlying the

CIO's demand (R. III, 669-670; R. II, 523-525; 538-539). Immediately following the dismissal of the stewards, the CIO's representatives distributed in the plant a notice advising that anyone attending the meeting would do so at the "risk of losing membership and employment" (R. I, 256; R. II, 473; R. III, 785; R. I, 259). There is no evidence that Petitioner received information as to the contents of this notice.

5. Late in the afternoon of July 30, 1945, a substantial majority of Petitioner's employees attended the announced meeting (R. I, 256-257). At that time, those present authorized the sending of telegrams to Petitioner and the CIO, advising that they had withdrawn from and severed relations with the CIO (R. I, 198-201; R. III, 786-787; 848-850; R. I, 259), and appointed a commitee of four to negotiate with Petitioner's management for the reinstatement of the five stewards (R. I. 196; R. III, 848-849). It was also resolved at that time to go on strike in the event the demand for the reinstatement of the stewards was refused (R. III, 849).

6. On July 31, 1945, the four committeemen called on Petitioner's representatives and requested the reinstatement of the stewards. This request was refused (R. I, 257). Shortly thereafter, officers of the CIO called upon Petitioner's representatives and delivered a letter announcing the suspension from membership of the four committeemen and demanding their removal from the job, under the terms of the agreement (R. III, 671-673; 846). At that time there occurred

a verbal clash in the presence of Petitioner's representatives between the committeemen and the officers of the CIO. The spokesman for the committee charged the CIO with having failed to obtain wage increases for the employees. An officer of the CIO pointed out in reply to this charge that due to wartime restrictions it had been impossible to get such increases, and that the CIO reserved the right to discipline its members and to keep them working (R. II, 527-528; 545). At that time, the CIO officers advised Petitioner's representatives that the committeemen could be suspended for many different reasons and that they would have to stand trial before they could go back to work (R. II, 538). This incident ended at about 9:30 o'clock A.M. on July 31, 1945, with the dismissal of the four committeemen (R. II, 528-529).

7. Later in the morning of July 31, 1945 the CIO distributed copies of a circular in the plant (R. I, 257). The circular stated, among other things, that "unscrupulous people who are attempting to promote strike action at this plant are traitors to our Union membership, our flag and our country" (R. III, 789-790; R. I, 259).

8. Beginning at approximately noon on July 31, 1945, a substantial majority of Petitioner's employees went on strike. The strike lasted until the morning of August 3, 1945 (R. I, 72-73; 257-258; R. II, 533).

9. At the invitation of the strikers, one of Petitioner's officers went to the meeting late in the afternoon of July 31, 1945. He urged the employees to go

back to work (R. I, 257-258), and advised them that the men who had been suspended could not go back to work because of the provisions of the contract (R. II, 529-530).

10. On August 2, 1945, the strikers voted to dissolve the Association and to affiliate with the A.F.L. (R. I, 258).

11. On August 3, 1945, the employees, with the exception of the five stewards and the four committeemen, returned to work (R. I, 258).

12. News reports which appeared in the local press, and which came to the attention of Petitioner, reported, among the causes of the strike, a dispute over the issue of racial discrimination (R. II, 533; R. III, 776-778).

13. During the period of the strike, Petitioner secured the opinion of legal counsel as to the rights and liabilities of the parties under the collective bargaining agreement. Counsel advised that Petitioner had to comply strictly with the terms of the closed shop provision and that Petitioner could not pass upon the merits of the action taken by the CIO in suspending the employees. Petitioner acted thereafter in accordance with this advice (R. III, 726-727).

14. On August 3, 1945, the A.F.L. filed a petition for investigation and certification of representatives with the Board, and by August 8, 1945, thirty-five of the employees involved had applied for membership in the A.F.L. The period following, up to and including October 15, 1945, was utilized by adherents

of the CIO and of the A.F.L. in campaigning. Literature of both unions circulated inside as well as outside the plant. A.F.L. and CIO buttons were widely and openly worn (R. I, 41).

15. On August 14, 1945 the Board gave notice of hearing of the A.F.L.'s petition for certification and this notice was received by Petitioner on August 17, 1945 (R. II, 549).

16. On August 14, 1945, the first unfair labor charge preferred by the A.F.L. against Petitioner was filed. The charge set forth that Petitioner was engaging in unfair labor practices because it had terminated the employment of the five stewards and the four committeemen "because of their refusal to adhere to policies" of the CIO (R. I, 92-93).

17. On August 17, 1945 the nine suspended employees requested reinstatement. This request was denied by Petitioner because of the advice it had received from its attorneys (R. III, 727-728).

18. On August 31, 1945 the CIO requested and obtained the discharge of six employees pursuant to the closed shop agreement (R. III, 806-807; R. II, 654-656).

19. On September 1, 1945, the CIO conducted a wholesale inspection of employees' union dues books at the plant (R. III, 681-682; 709-713).

20. On August 31, 1945, and prior to the dues checking incident above referred to, a minor official of the CIO came to Petitioner's labor relations manager and requested the suspension of a long list of

employees, and stated, in support of his request, that the persons involved were in bad standing, that some of them had not paid their dues and that others were not members of the CIO. Petitioner's representative refused to accede to this request and took up the matter with another official of the CIO (R. III, 728-732).

21. On the day following the dues book checking incident, that is, September 1, 1945, Petitioner's representatives received a letter from the CIO requesting removal from the job of nineteen additional employees under the terms of the collective bargaining agreement and advising that the persons named therein were no longer in good standing (R. III, 792-793; R. I, 315). Petitioner complied with this demand, but prior to doing so it made inquiry from the CIO as to the reasons why these employees had been placed in bad standing and the CIO's reply to this inquiry was that these persons had violated their oath, the constitution and the by-laws of the CIO (R. III, 736).

22. Some days after September 1, 1945, four additional employees were dismissed pursuant to demands made by the CIO under the terms of the closed shop contract. One was discharged on September 5th, two on September 7th, and the fourth on September 11th, 1945 (R. I, 50 and Note 20; R. II, 806-807; R. II, 654-656).

23. Subsequent to their discharge, the five stewards and the four committeemen and the twenty-eight additional employees were tried before CIO rank and file tribunals. The transcript of the proceedings

before the CIO tribunals and the decision of the CIO were received in evidence (R. III, 877-922; 923; 987; 856; 866; 867-876; R. III, 771; 779).

24. The four committeemen and the five stewards refused to stand trial and were tried *in absentia* on October 3, 1945. On October 10, 1945 they were found guilty and expelled. They had been charged with dereliction of duty, failure to enforce the policy against racial discrimination and participation in a strike during the war (R. I, 52-53; R. III, 856-866; 877-922).

25. On October 16, 1945 an election of bargaining representatives was held at the plant and pursuant to the decision and direction of election issued by the Board on September 26, 1945 (R. II, 549). At this election the majority of votes was cast in favor of the CIO, notwithstanding the fact that most of the discharged employees voted (R. II, 550-551).

26. Sometime in November, 1945, the CIO informed Petitioner of the action taken with respect to the four committeemen and the five stewards (R. I, 154; R. III, 741-742; 762).

27. On December 17, 1945, the remaining twenty-eight employees who were members of the CIO were tried by the CIO (R. III, 923-987). Some of them withdrew after having participated in the preliminary portions of the trial (R. III, 924; 930-935). The ones who remained, eventually entered a plea of guilty and admitted that they had engaged in a prohibited strike (R. III, 969-976). On December 24, 1945 the trial committee issued its decision recom-

mending the expulsion of the employees who failed to stand trial and that the employees who pleaded guilty be placed on probation (R. III, 867-876).

The proceedings had before the Board and the United States Court of Appeals for the Ninth Circuit subsequent to the occurrence of the above narrated events can be summarized as follows:

1. The Board issued its complaint on January 1, 1946 (R. 1, 4-10) pursuant to charges preferred against Petitioner by the A.F.L. (R. I, 1-4). The complaint charged, in substance, that Petitioner had interfered with the rights guaranteed the employees by Section 7 of the National Labor Relations Act (29 U.S.C.A. 157) and had committed unfair labor practices in violation of Section 8 of the same Act (29 U.S.C.A. 158), in discharging and threatening to discharge employees and refusing to reinstate them because of their membership in and activity on behalf of the A.F.L. and the Association and because of their failure or refusal to join or assist the CIO. The Petitioner's answer denied certain allegations of the complaint and set forth the closed shop provision of the contract pursuant to which it acted. Its answer also set forth that some of the employees had been suspended and expelled by the CIO because of violations of its constitution and its policy against wartime strikes (R. I, 10-16).

2. A hearing was had on the matter from February 4 to February 6, 1946, at San Francisco, California,

before a Trial Examiner duly appointed by the Board (R. I, 21).

3. On March 27, 1946 the Trial Examiner issued his Intermediate Report and recommended therein that the complaint as a whole be dismissed (R. I, 17-68). The Trial Examiner found that under the facts it was impossible for Petitioner to determine whether the CIO had suspended the discharged employees for such valid reasons as their resignation from the CIO, and their participation in the strike, or because of their activities on behalf of the A.F.L., and the Association. He also found, in this connection, that the Petitioner could have ascertained the "true" motivation of the CIO only by intruding into the internal affairs of that Union, in violation of the National Labor Relations Act (R. I, 61-65).

4. On September 6, 1946, the Board issued its decision and order overruling the recommendation of the Trial Examiner (R. I, 68-83), and found that Petitioner had discharged and refused to reinstate the employees in violation of Section 8 (1) and (3) of the Act. (29 U.S.C.A. 158 (1) and (3).) The order issued by the Board pursuant to said decision requires Petitioner to offer immediate and full reinstatement to the discharged employees and to make them whole for any loss of pay suffered as a result of their discharge (R. I, 81-82). The Board, in making its decision, applied the doctrine developed by it in *Matter of Rutland Court Owners,* 44 N.L.R.B.(F) 587. The substance of the principle enunciated by the Board in that case is that an employer cannot properly discharge employees

pursuant to the closed shop provisions of a contract when, to his knowledge, the discharge is requested by the contracting Union for the purpose of eliminating employees who have sought to change bargaining representatives at a period when it is appropriate for the employees to seek a redetermination of representatives. The Board presumed, inasmuch as Petitioner had information indicating that the motive of the CIO *might* have been reprisal against the employees because of their advocacy of the A.F.L., that the Petitioner had, in fact, knowledge of this alleged discriminatory motivation. (Analysis, Sept. 23, 1946, 18 L.R.R. 85, 86-87.) The Board also found in this connection that Petitioner "made no bona fide effort to evaluate all the evidence before it" when it contended that it could not determine the CIO's "true" motivation (R. I, 78-79). The Board thus decided for the first time that an employer had the duty to evaluate or appraise evidence, yet the finding that the Petitioner did not act in good faith is based on the assumption that it knew that it was its duty to evaluate evidence. The other findings of the Board with respect to the Petitioner's alleged knowledge of the CIO's motives are all based on inference and on "expertness". The Board had to rely on inference and "expertness", because although it had direct evidence regarding this issuable fact it chose not to produce it.

5. On December 30, 1946, Petitioner filed its Petition for Review of the Board's decision and order in the United States Court of Appeals for the Ninth Circuit (R. I, 101-126). On February 3, 1947, the Board

filed its answer to Petitioner's petition, requesting the denial thereof and enforcement of the Board's order (R. I, 134-144).

6. On January 13, 1949, the Court of Appeals rendered its opinion and judgment affirming the decision of the Board (R. IV, 990-992). The Court stated in its opinion that the "evidence abundantly supports" the following findings of ultimate facts made by the Board:

(a) That the CIO sought to use the closed shop contract for the purpose of punishing the insurgents; and

(b) That Petitioner acceded to the discharge-demands notwithstanding it knew that the Union had suspended the men in reprisal for their activities in favor of the rival Union (R. IV, 992).

It is apparent from the Court's brief opinion that in approving the Board's findings it did not consider the following material facts:

(a) The employees' resignation from the CIO.

(b) The participation of all the discharged employees in an unauthorized strike, and the CIO's undisputed right to discipline the persons who took part in it.

(c) The admission of the five stewards and the four committeemen that they were suspended from the CIO because of their refusal to adhere to its policies.

Petitioner pointed out to the Court of Appeals that the Board, in making its findings of ultimate facts, had erred on questions of law. Among these were the following:

(a) Whether the CIO's lawful act of suspending the employees who participated in the strike was converted by its alleged malicious or bad motivation into an unlawful act.

(b) Whether the Board could rely, to carry the burden of proof, on the issuable fact of Petitioner's knowledge of the CIO's motives, on inferences and "expertness", when the Board had direct evidence as to this fact but chose not to produce it.

(c) Whether the finding of the Board that Petitioner made no bona fide effort to evaluate the evidence before it, is invalid because it is based on the equally invalid presumption that the Petitioner knew, before the fact, how the Board would construe the law.

The Court failed to pass on any of the questions of law above summarized.

In affirming the Board's decision, the Court of Appeals approved for the second time the principle established by the Board in *Matter of Rutland Court Owners*, 44 N.L.R.B.(F) 587, and stated that its approval of this principle in *Local No. 2880 v. N.L.R.B.*, 158 Fed. (2d) 365, controlled in the present case. This Court granted certiorari in *Local No. 2880 v. N.L.R.B.*, *supra* (331 U.S. 798, 91 L. Ed. 1824), but thereafter the petition was dismissed on motion of the petitioning Union. (332 U.S. 845.)

Petitioner, for the reasons hereinafter stated, now seeks review and reversal of the judgment of the Court of Appeals for the Ninth Circuit.

QUESTIONS PRESENTED.

Section 8 (1) and (3) of the National Labor Relations Act (29 U.S.C.A. 158 (1) and (2)), allegedly violated by the Petitioner, reads as follows:

> "Section 158. Unfair Labor Practices by Employer Defined.
>
> It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.
>
> * * * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, *That nothing in sections 151-166 of this title or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization* (not established, maintained, or assisted by any action defined in sections 151-166 of this title as an unfair labor practice) *to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective bargaining unit covered by such agreement when made.*" (Italics ours.)

The Board has ruled that the proviso to Section 8 (3), permiting a "closed shop" contract, is suspended at a time when it is appropriate for the employees to seek a redetermination of representatives, and when the employer *knows* that the contracting union has terminated or suspended the membership of an employee because of his advocacy of another bargaining agency. In view of the express language of the statute allegedly violated and of the facts and circumstances involved, this decision of the Board and the affirmance thereof by the Court of Appeals raise the following questions:

1. Whether the Board usurped the powers and functions of Congress by adding, through alleged construction, the following qualification to the proviso to Section 8 (3):

> "No employer shall justify any discrimination against an employee for nonmembership in a labor organization if he knows that membership was suspended or terminated because of activity to secure a determination pursuant to Section 9, at a time when a question concerning representation may be appropriately raised."[3]

2. Whether the Board, by nullifying a "closed shop" contract and interfering in the internal affairs of a union, usurped the powers and functions of Congress by adding, through alleged construction, the fol-

[3]Based on "Federal Labor Relations Bill of 1947" (S. 1126), as passed by the Senate (deleted in Conference). See special supplement to Teller "The Law Governing Labor Disputes and Collective Bargaining", pages 71-72 and "The New Labor Law", page C-20 (The Bureau of National Affairs).

lowing specification of unfair labor practices to Section 8:

> "It shall be an unfair practice for a labor organization or its agents—
>
> (1) To restrain or coerce employees in the exercise of the rights guaranteed in Section 7 * * *;
>
> (2) To persuade or attempt to persuade the employer to discriminate against an employee with respect to whom membership in such organization has been suspended or terminated because he engaged in activity to secure a determination pursuant to Section 9, at a time when a question concerning representation may be appropriately raised."[4]

If, in answer to the question presented in (2) above, it is held that the Board did not have the power to punish the CIO, directly or indirectly, for alleged unfair labor practices, whether the Board could require the vicarious expiation of the wrong-doing, if any, of the CIO through punishment visited upon the Petitioner.

3. If it is held that the Board has properly construed Section 8 and has not usurped the powers and functions of Congress, whether the CIO's alleged unfair or malicious motivation deprives it of the legal

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[4]Based on "Federal Labor Relations Bill of 1947" (S. 1126), as passed by the Senate. Subsection (1) was modified and expanded in the Labor Relations Management Act, 1947; subsection (2) was deleted in Conference. See special supplement to Teller "The Law Governing Labor Disputes and Collective Bargaining", p. 72, and "The New Labor Law", page C-21 (The Bureau of National Affairs).

right to discipline its members when they have committed a plain and clear violation of its policies and pledge against wartime strikes.

4. If it is held that the Board has properly construed Section 8 and has not usurped the powers and functions of Congress, whether the Petitioner had the legal right and obligation to refuse to perform the admittedly valid "closed shop" provision of the agreement, if it knew that the CIO, in exercising the legal right to discipline its members because of a plain and clear violation of its rules, was motivated by malice and ill-will against those who sought to displace it as a representative of Petitioner's employees.

5. If it is held that the Board has properly construed Section 8 and has not usurped the powers and functions of Congress, whether members of a union, who have plainly and clearly violated its rules, may immunize themselves against discipline by activity on behalf of a rival union.

6. If it is held that the Board has properly construed Section 8 and has not usurped the powers and functions of Congress, whether the CIO because of its alleged unfair motivation can be deprived of the right to obtain, under the terms of a valid "closed shop" agreement, the discharge of persons who have voluntarily resigned from its membership.

7. If it is held that the Board has properly construed Section 8 and has not usurped the powers and functions of Congress, whether the Board sustained the burden of proving that Petitioner knew that the

CIO had disciplined its members because of their anti-CIO activity, and not because of their plain and clear violation of the CIO policies against wartime strikes, racial discrimination, etc.

8. If it is held that the Board has properly construed Section 8 and has not usurped the powers and functions of Congress, whether the Board sustained the burden of proving that the Petitioner made no bona fide effort to evaluate the evidence before it.

In the event that the construction which the Board placed on Section 8(1) and (3) is held invalid as an usurpation of the powers and functions of Congress, these questions are also raised:

9. Whether the Board, by nullifying the "closed shop" contract, deprives the Petitioner and the CIO of property without due process.

10. Whether the Board, in ordering Petitioner to make whole the discharged employees for loss of pay, deprives the Petitioner of property without due process.

The Court of Appeals, in reviewing this case, did not review the whole record and the portions thereof cited by Petitioner, and did not decide certain relevant questions of law. The action of the Court, therefore, raises the following question:

11. Whether the Court of Appeals complied with the statutory duty cast upon it by 5 U.S.C.A. 1009, and by 29 U.S.C.A. 160(f). (Labor Management Relations Act, 1947.)

REASONS FOR GRANTING WRIT.

1. Conflict of Decision Between Circuits.

The Board's doctrine enunciated in *Matter of Rutland Court Owners*, 44 N.L.R.B. (F) 587, has been approved by the Court of Appeals for the Ninth Circuit in the instant case and in *Local No. 2880 v. N.L.R.B.*, 158 Fed. (2d) 365. The Circuit Court of Appeals for the Second Circuit has likewise approved the Board's doctrine in *N.L.R.B. v. American White Cross Laboratories*, 167 Fed. (2d) 75. On the other hand, the Circuit Court of Appeals for the Seventh Circuit has unqualifiedly rejected the Board's attempt to amend the proviso to Section 8(3) of the National Labor Relations Act in the cases of *Aluminum Company of America v. N.L.R.B.*, 159 Fed. (2d) 253 and *Louis Meier Co. v. N.L.R.B.*, 21 L.R.R.M. 2093, 13 Labor Cases, Par. 64163.

2. The Decision of the Court of Appeals Herein Misapplies this Court's Decision in the Wallace case.

The Court of Appeals held that its ruling in the instant case was controlled by its decision in *Local No. 2880 v. N.L.R.B.*, supra. In *Local 2880*, the Court of Appeals held that the doctrine announced by the Board in *Matter of Rutland Court Owners*, supra, was sustained by this Court's decision in *Wallace Corporation v. N.L.R.B.*, supra, 323 U.S. 248, 89 L. Ed. 216. This Court's decision in the *Wallace* case applies to misconduct and collusion between an employer and a company union to deprive employees of rights guaranteed by Section 7 of the National

Labor Relations Act. We, therefore, submit that the principle announced therein is misapplied, when it is sought to extend it to a situation involving an employer who has not colluded or conspired to contravene Section 7 of the National Labor Relations Act, but has merely complied with the obligations of an admittedly valid "closed shop" contract.

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3. The Decision of the Court of Appeals Sanctions Legislation by the Board and it is Therefore in Conflict With the Applicable Decisions of this Court.

The Board, by adding qualifications to the proviso of Section 8(3) of the National Labor Relations Act and by interfering with the property rights of a labor organization, has, in effect, amended the Act. The Court of Appeals, in giving its approval to these acts of legislation, decided important questions of Federal law in conflict with the applicable decisions of this Court.

> "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive."
>
> *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 88 L. Ed. 1488.

See also:

Iselin v. United States, 270 U.S. 245, 70 L. Ed. 566;

Manhattan G. E. Co. v. Commissioner of Int. Rev., 297 U.S. 129, 80 L. Ed. 528;

Koshland v. Helvering, 298 U.S. 441, 80 L. Ed. 1268;

Electric Storage Battery Co. v. Shimadzu, 307 U.S. 5, 83 L. Ed. 1071;

Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 84 L. Ed. 656;

Helvering v. Credit Alliance Corp., 316 U.S. 107, 86 L. Ed. 1307;

Helvering v. Sabine Transp. Co., 318 U.S. 306, 87 L. Ed. 773.

4. The Decision of the Court Granting the Board the Power to Destroy Valid Union Shop Agreements and to Interfere With the Internal Affairs of Unions Presents a Problem Which Should be Resolved by this Court.

The Labor Management Relations Act, 1947, prohibits the "closed shop", but has left unimpaired and in full force and effect all "closed shop" contracts entered into prior to the date of its enactment.[5] The decision of the Court of Appeals, however, seriously affects, impairs and disturbs employer-employee relationships controlled by all such contracts. The Board and the Court of Appeals have, in effect, through the decision herein, done that which Congress refused to do, to-wit, impair the integrity and validity of "closed shop" contracts validly made pursuant to the pro-

[5]Sec. 102, Labor Management Relations Act, 1947.

visions of Section 8 of the National Labor Relations Act. We submit, therefore, that the Court of Appeals has erroneously decided a question of great public importance gravely affecting labor-management relationships in many industries.

The Labor Management Relations Act, 1947, prohibits the discharge of an employee for "*non-membership*" in a labor organization if the employer has reasonable grounds for believing that membership was denied or terminated for reasons other than failure of the employee "to pay dues or initiation fees", but has left unimpaired the right of unions to request a discharge of a *union member* for reasons other than the advocacy of a rival organization, and has likewise left unimpaired the right of unions to prescribe their "own rules with respect to the acquisition or retention of membership".[a] The Court of Appeals, however, has in effect, by its decision herein, vested in the Board power to interfere in the internal affairs of unions and seriously to impair their right to discipline their members. These are prerogatives not granted the Board by either the Labor Management Relations Act, 1947, or by the National Labor Relations Act. We submit, therefore, that the Court of Appeals has erroneously decided another question of great public importance seriously affecting all labor organizations and their millions of members.

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[a]Van Arkel, "An Analysis of the Labor Management Relations Act, 1947", pp. 31-32.

5. The Failure of the Court of Appeals to Review the Case in Accordance With Statutory Standards Prescribed by Congress Presents a Question Which Should be Resolved by this Court.

The Administrative Procedure Act and the Labor Management Relations Act, 1947, require that the Court shall review the whole record or such portions thereof as may be cited by any party. The Court of Appeals did not, in the instant case, comply with this requirement.

The Administrative Procedure Act requires that the reviewing Court decide all relevant questions of law and that it set aside findings and conclusions that are arbitrary and capricious or otherwise not in accordance with law. The Court of Appeals, in the instant case, did not comply with these requirements.

6. The Decision of the Court of Appeals, Sustaining the Findings of Fact of the Board, is in Conflict With the Applicable Decisions of this Court.

(a) The findings of the Board with respect to the issuable fact of Petitioner's knowledge of the CIO's motive, based on inference and expertness, should have been rejected by the Court of Appeals, because there was direct evidence readily available concerning this fact, but the Board chose not to produce it.

Galloway v. U. S., 319 U.S. 372, 87 L. Ed. 1458.

(b) The findings of the Board that Petitioner made no bona fide effort to evaluate the evidence concerning the CIO's motivation should have been rejected by the Court of Appeals because it is based on

the irrational presumption that the Petitioner knew, before the fact, how the Board would construe the law.

Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 83 L. Ed. 126.

WHEREFORE, Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
April 1, 1949.

Respectfully submitted,

PHILIP S. EHRLICH,
BARTLEY C. CRUM,
Attorneys for Petitioner.

R. J. HECHT,
Of Counsel.

(Appendices A and B Follow.)

Appendix A

In the United States Court of Appeals for the Ninth Circuit

Colgate-Palmolive-Peet Company, Petitioner, vs. National Labor Relations Board, Respondent, and International Chemical Workers Union, A.F.L., et al., Intervenors, and Warehouse Union Local 6, International Longshoremen's & Warehousemen's Union (CIO), Intervenor, and National Labor Relations Board, Petitioner, vs. Colgate-Palmolive-Peet Company, Respondent.	No. 11,514 Jan. 13, 1949

Upon Petition for Review and Petition to Enforce Order of the National Labor Relations Board

Before: Mathews, Healy, and Bone, Circuit Judges

Healy, Circuit Judge

This matter is here on petition of Colgate-Palmolive-Peet Company to set aside an order of the National Labor Relations Board, and on the Board's cross-petition for the enforcement of its order.

The case relates to Colgate's discharge of and its refusal to reinstate certain employees, thirty-seven in number, a course determined by the Board to be discriminatory under § 8(1) and (3) of the Act. The illegality of Colgate's conduct, as determined by the Board, resides in its discharge of the employees pursuant to a closed-shop contract on demand of the union party thereto which had suspended the employees because of their activities in favor of a rival union at a time when activities looking toward a change of bargaining representatives were appropriate.

The closed-shop contract was between Colgate and a local of the CIO. It was entered into in 1941 for a term of indefinite duration, that is, "until changes become necessary because of conditions beyond the control of the Company or are requested by the employees through their representatives." A condition of employment was that employees be "members in good standing" of the union. On July 24, 1945, a supplemental agreement was made extending the contract by providing that it should remain in effect pending the approval or disapproval by the Tenth Regional War Labor Board of certain changes.

Dissatisfaction with the CIO representation had been developing among Colgate's employees for some six months before the extension. Agitation was rife for the unhorsing of that union and the substitution of

the AFL as bargaining representative. Organizational efforts of the insurgents culminated shortly in a series of meetings attended by a substantial majority of the employees, and in a vote to affiliate with the AFL. Steps were then taken to secure a change of representation by resort to formal Board process. The CIO countered with a series of suspensions followed by discharge-demands predicated on the suspensions, with the result that the employees here involved were discharged. These constituted substantially the ringleaders of the insurgent group.

The Board found as ultimate facts (a) that the CIO sought to use the closed-shop contract for the purpose of punishing the insurgents, and (b) that Colgate acceded to its discharge-demands notwithstanding Colgate knew that the union had suspended the men in reprisal for their activities in favor of the rival union. The evidence abundantly supports these findings. As a matter of law, the Board determined that the closed-shop contract did not preclude the employees from engaging in these activities at the time they did so. Its decision rests upon the reasoning followed in Matter of Rutland Court Owners, 44 NLRB 587; 46 NLRB 1040. This view had our approval in Local No. 2880 v. National Labor Relations Board, 158 F. (2d) 365. The latter holding controls the present case.

The petition of Colgate is accordingly denied and a decree directed enforcing the Board's order in full.

(Endorsed:) Opinion. Filed Jan. 13, 1949. Paul P. O'Brien, Clerk.

Appendix B

29 U.S.C.A. 157 (National Labor Relations Act):

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

29 U.S.C.A. 158 (National Labor Relations Act):

"It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

(2) * * * ;

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in sections 151-166 of this title or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 159 (a), in the appropriate collective bargaining unit covered by such agreement when made."

29 U.S.C.A. 158 (Labor Management Relations Act, 1947):

"(a) It shall be unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) * * * ;

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this sub-chapter or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 158 (a) of this title as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made; * * *: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (a) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (b) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required

as a condition of acquiring or retaining membership;

(4) * * *

(5) * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *;

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; * * *."

29 U.S.C.A. 160 (f) (Labor Management Relations Act, 1947):

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in

such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

5 U.S.C.A. 1009 (e) (Administrative Procedure Act):

"So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not

in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No.

COLGATE-PALMOLIVE-PEET COMPANY,
Petitioner,

vs.

THE NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INTERNATIONAL CHEMICAL WORKERS UNION, A. F. L., et al.,
Intervenors,

and

WAREHOUSE UNION LOCAL 6, INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION (CIO),
Intervenor.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

PRELIMINARY STATEMENT.

Reference is hereby made to the foregoing petition for the opinions below, grounds of jurisdiction, statutes

involved, statement of the case, questions presented and reasons for granting the writ.

SPECIFICATIONS OF ERROR.

Petitioner submits that the Court of Appeals erred in the following particulars:

1. In holding that Congress intended, in enacting the National Labor Relations Act, that discharges made pursuant to a valid closed shop contract should in themselves constitute an unfair labor practice.

2. In holding that Congress intended, in enacting the National Labor Relations Act, that the Board should have the power to regulate employees and labor organizations.

3. In holding that Congress intended, in enacting the National Labor Relations Act, to prohibit the coercion of employees by employees or labor organizations.

4. In holding that Congress intended, in enacting the National Labor Relations Act, to empower the Board to protect a recalcitrant union member from his Union's discipline.

5. In affirming the findings and conclusions of the Board, that Petitioner committed acts inhibited by Section 8 (1) and (3) of the National Labor Relations Act, without the support of substantial evidence.

6. In failing to review the whole record, or the portions thereof cited by the Petitioner.

7. In failing to decide relevant questions of law and in failing to set aside findings and conclusions that are arbitrary and capricious and not in accordance with law.

SUMMARY OF THE ARGUMENT.

1. The decision and order affirmed by the Court is based on the premise that Congress intended through the National Labor Relations Act to prohibit the coercion of employees by labor organizations. This premise is an essential prerequisite; otherwise, the Board's order effectively impairing the CIO's contract rights would constitute an arbitrary exercise of power. This premise is false. The express language of the Act and its Congressional history furnish ample proof of its falsity. The decision of the Court of Appeals affirming the order of the Board is therefore erroneous and in conflict with the applicable decisions of this Court.

2. The decision of the Court of Appeals is based on the premise that this Court's decision in the *Wallace* case is applicable to cases involving closed shop contracts with bona fide unions. This premise is false. The opinion of this Court in the *Wallace* case, read as a whole, discloses that this premise is false. The Court of Appeals for the Seventh Circuit in *Aluminum Co. of America v. National Labor Relations Board*, 159 Fed. (2d) 523 applies properly the doctrine of the *Wallace* case and defines correctly the

limits of the Board's statutory authority, and for these reasons the existing conflict should be resolved in its favor.

3. The decision of the Court of Appeals establishes a precedent, which if allowed to stand will permit recalcitrant union members to disrupt and unsettle contracts designed to stabilize labor-management relationships.

4. The order and decision affirmed by the Court of Appeals defeats the purpose of the National Labor Relations Act and will not effectuate its policies and should, therefore, be set aside.

5. The Court of Appeals failed to review the instant case in accordance with the standards promulgated in the Administrative Procedure Act and the Labor Management Relations Act, 1947.

6. The Court of Appeals in sustaining certain essential findings of fact made by the Board made a decision in conflict with the applicable decisions of this Court.

ARGUMENT.

1. **THE DECISION AND ORDER AFFIRMED BY THE COURT IS BASED ON THE PREMISE THAT CONGRESS INTENDED THROUGH THE NATIONAL LABOR RELATIONS ACT TO PROHIBIT THE COERCION OF EMPLOYEES BY LABOR ORGANIZATIONS. THIS PREMISE IS AN ESSENTIAL PREREQUISITE; OTHERWISE, THE BOARD'S ORDER EFFECTIVELY IMPAIRING THE CIO'S CONTRACT RIGHTS WOULD CONSTITUTE AN ARBITRARY EXERCISE OF POWER. THIS PREMISE IS FALSE. THE EXPRESS LANGUAGE OF THE ACT AND ITS CONGRESSIONAL HISTORY FURNISH AMPLE PROOF OF ITS FALSITY. THE DECISION OF THE COURT OF APPEALS AFFIRMING THE ORDER OF THE BOARD IS THEREFORE ERRONEOUS AND IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.**

The decision and order of the Board herein was affirmed by the Court of Appeals for the Ninth Circuit on the authority of its decision in the case of *Local No. 2880 v. N.L.R.B.*, 158 Fed. (2d) 365. In that case the Court of Appeals gave approval for the first time to the doctrine enunciated by the Board in the *Matter of Rutland Court Owners*, 44 N.L.R.B. (F) 587. In the last mentioned case, the Board held that Section 8(3)[7] of the National Labor Relations Act does not permit an employee to comply with the "closed shop" provisions of a contract when to his knowledge enforcement of the contract is being sought for rival union activities, where such activities are carried on during a period when it is appropriate to seek a change in representation. This view, the Board states, represents its considered judgment as to how the conflict between the general guarantees of Section 7,[8] which

[7]Appendix "B", p. 34.
[8]Appendix "B", p. 34.

permits employees to choose and change representatives, and the limitations imposed by the proviso to Section 8 (3), which permits discipline of employees in the interest of Union security, may most reasonably be reconciled so that the legitimate scope of each may be preserved without nullifying the other. The Board's construction of the proviso of Section 8 (3) in relation to Section 7 was upheld by the Court of Appeals on the basis of the following proposition:

A labor organization which so coerces an employee as to cause him to exercise the rights guaranteed by Section 7 in fear of discharge is ineligible to become or remain a party to a closed shop contract, and a discharge by an employer pursuant to a contract vitiated by the ineligibility of the coercing union, is assistance of the type defined by Section 8 (1)[9] of the Act as an unfair labor practice. (158 Fed. (2d) 368, 369.)

The reasoning of the Court of Appeals depends for its validity on the truth of the premise that a labor organization which coerces employees "is ineligible to become a party to a closed shop contract", and this premise itself must depend for its validity on the assumption that Congress intended to make illegal the coercion of employees by employees or labor organizations. The assumption that Congress intended to forbid the coercion of employees by labor organizations is an essential prerequisite, otherwise, the Board's order effectively impairing the Union's rights

[9]Appendix "B", p. 34.

under the contract, would be entirely without support, and would constitute an arbitrary exercise of power.[10] We submit that there is nothing in the Act or in its history that expressly or by implication can lend support to this assumption.

The only unfair labor practices denounced and defined by the Act are those of the employer. No mention is made therein of the unfair labor practices of Unions. That Congress intended that there should be no unfair labor practices other than those of the employer is clearly shown by the Senate Report which accompanied the adoption of the Act. There, the following appears:

> "*Sections 7 and 8. Rights of Employees.*—These sections are designed to establish and protect the basic rights incidental to the practice of collective bargaining. At this juncture the committee wishes to emphasize two points. In the first place, the unfair labor practices under the purview of this bill are strictly limited to those enumerated in section 8. This is made clear by paragraph 8 of section 2, which provides that 'The term "unfair labor practice" means any unfair labor practice listed in Section 8,' and by section 10 (a) empowering the Board to prevent any unfair labor practice 'listed in Section 8.' Unlike the Federal Trade Commis-

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[10] "We think that the Brotherhood and its locals having valuable and beneficial interests in the contracts were entitled to notice and hearing before they could be set aside."

Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 233, 83 L.Ed. 126, 142.

"Further, the Act gives no express authority to the Board to invalidate contracts with independent labor organizations."

Consolidated Edison Co. v. N.L.R.B., supra, 305 U.S. 235, 83 L.Ed. 143.

sion Act, which deals somewhat analogously with unfair trade practices, this bill is specific in its terms. *Neither the National Labor Relations Board nor the courts are given any blanket authorits to prohibit whatever labor practices that in their judgment are deemed to be unfair.* * * *"* Senate Report No. 573, May 2, 1935, 74th Cong. 1st Sess. (Italics ours.)

The Senate Report also clearly and unmistakably shows that Congress did not intend to prohibit the coercion of employees by labor organizations or to grant power to the Board to regulate unions, directly or indirectly, through orders directed at the employer.[11] We refer the Court to the following taken from this Report:

> *"Regulation of employees and labor organizations is no more germane to the purpose of this bill than would be the regulation of employers and employer associations in connection with the organization of employers in trade associations.*
>
> *There is an even more important reason why there should be no insertion in the bill of any provision against coercion of employees by employees or labor organization;* courts have held

[11] "In reaching a conclusion as to such a matter, the Court would be guided by all appropriate manifestations of legislative intention. Thus, if statutory language or an explanation in the legislative history showed that any of the above factors should or should not be considered the Court would so rule. Or if the legislative history manifested a definite understanding that the Act was or was not to apply to a particular class of persons, that would also be controlling, since the manifested legislative intention is 'law' in the strictest sense."

Stern, *"Review of Findings of Administrators, Judges and Juries: A Comparative Analysis,"* 58 Harvard Law Review, 70, 98.

a great variety of activities to constitute 'coercion'; a threat to strike, a refusal to work on material of non-union manufacture, circularization of banners and publications, picketing, even peaceful persuasion. In some courts *closed shop agreements* or strikes for such agreements *are condemned as 'coercive'; thus, to prohibit employees from coercing their own side would not merely outlaw the undesirable activities which the word connotes to the layman, but would raise in Federal law the ghosts of many much-criticized injunctions issued by courts of equity against activities of labor organizations—ghosts which it was supposed Congress had laid low in the Norris-LaGuardia Act.*" (Italics ours.) See Senate Reports, Vol. 9877, 74th Congress, First Session, R. 573, to accompany S. 958, May 2, 1935, page 16.

Moreover, the Board itself confesses that it is powerless to regulate labor unions under the National Labor Relations Act. In *Matter of Lewis Meier & Company*, 73 N.L.R.B. (F) 520, 523, the Board said:

"Moreover, it appears from the legislative history of the Act that Congress rejected the concept that labor organizations should be made amenable to Section 8 thereof. The respective committee reports to both the Senate and the House of Representatives mention proposals for prohibiting labor organizations, as well as employers, from engaging in activities defined in Section 8 as unfair labor practices. *Indeed, attention was explicitly called to the possibility of arbitrary use of the closed shop by labor organizations, and specific proposals were made for its avoidance. Congress, however, refused to include any of these proposals in the Act as written.*" (Italics ours.)

It is clear, therefore, that in coercing its own side, a Union did not, under the National Labor Relations Act, indulge in culpable conduct violative of any Congressional mandate.

Accordingly, it is respectfully submitted that the premise upon which the decision of the Court of Appeals is based is false. From this it follows that the impairment of the CIO's contractual rights through an order directed at the Petitioner is without warrant and constitutes legislation in the guise of adjudication, and is in conflict with the following decisions of this Court:

Addison v. Holly Hill Fruit Products, 322 U.S. 607, 88 L. Ed. 1488;

Iselin v. U. S., 270 U.S. 245, 70 L. Ed. 566;

Manhattan G. E. Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 80 L. Ed. 528;

Koshland v. Helvering, 298 U.S. 441, 80 L. Ed. 1269;

Electric Storage Battery Co. v. Shimadzu, 307 U.S. 5, 83 L. Ed. 1071;

Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 84 L. Ed. 656;

Helvering v. Credit Alliance Corp., 316 U.S. 107, 86 L. Ed. 1307;

Helvering v. Sabine Transp. Co., 318 U.S. 306, 87 L. Ed. 773.

We submit also that this arbitrary exercise of power by the Board is actually a deprivation of the Peti-

tioner's and the CIO's property rights without due process.

Carrow, *"Background of Administrative Law"*, pp. 90; 116-117;

Cushman, *"Independent Regulatory Commissions"*, 24 Cornell Law Quarterly, 13, pp. 32-33.

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2. THE DECISION OF THE COURT OF APPEALS IS BASED ON THE PREMISE THAT THIS COURT'S DECISION IN THE WALLACE CASE IS APPLICABLE TO CASES INVOLVING CLOSED SHOP CONTRACTS WITH BONA FIDE UNIONS. THIS PREMISE IS FALSE. THE OPINION OF THIS COURT IN THE WALLACE CASE, READ AS A WHOLE, DISCLOSES THAT THIS PREMISE IS FALSE. THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN ALUMINUM CO. OF AMERICA v. NATIONAL LABOR RELATIONS BOARD, 159 FED. (2d) 523 APPLIES PROPERLY THE DOCTRINE OF THE WALLACE CASE AND DEFINES CORRECTLY THE LIMITS OF THE BOARD'S STATUTORY AUTHORITY, AND FOR THESE REASONS THE EXISTING CONFLICT SHOULD BE RESOLVED IN ITS FAVOR.

The decision of the Court of Appeals herein was made on the authority of *Local No. 2880 v. N.L.R.B.*, supra. In that case, the Court of Appeals held that the conclusion reached by the Board in *Matter of Rutland Court Owners*, supra, was supported by the decision of this Court in *Wallace Corporation v. N.L.R.B.*, 323 U.S. 248, 89 L. Ed. 216, and quoted the following from this Court's opinion as supporting the Board's conclusion:

> "* * * We do not construe the provision authorizing a closed shop contract as indicating an intention on the part of Congress to authorize

> a majority of workers and a company, as in the instant case, to penalize minority groups of workers by depriving them of that full freedom of association and self-organization which it was the prime purpose of the Act to protect for all workers* * *.'"

This incomplete statement of this Court's ruling, taken by itself, would indicate that this Court had approved regulation by the Board of bona fide independent unions, and that this Court had made a decision in conflict with the clear terms of the statute and the intent of Congress. However, two sentences that follow the portion of the opinion quoted by the Court of Appeals show unmistakably that this Court's decision in the *Wallace* case applies solely to the unfair labor practices of an employer committed through the medium of a dominated or company union. The portions of the opinion omitted by the Court of Appeals read as follows:

> "It was as much a deprivation of the rights of these minority employees for the company discriminatorily to discharge them in collaboration with the Independent as it would have been had the company done it alone. *To permit it to do so by indirection, through the medium of a 'union' of its own creation, would be to sanction a readily-contrived mechanism for evasion of the Act.*" (Italics ours.) (393 U.S. 256, 89 L. Ed. 227.)

It seems to us very clear, in view of the express language of the statute, its history and the opinion of this Court, read as a whole, that the Court of Appeals

has misapplied the doctrine of the *Wallace* case when it has extended it to a closed shop contract with a bona fide union.

The *Wallace* case was also called to the attention of the Court of Appeals for the Seventh Circuit as supporting the contentions of the Board. That Court held the *Wallace* case inapplicable in a situation where, as here, "the discharge is pursuant to an existent closed shop agreement untainted by any unfair labor practice." (159 Fed. (2d) 526.)

In making this ruling, the Court examined the clear and unambiguous language of the statute and said:

> "It is apropos at this point to note that the Board's order appears to be founded upon a misinterpretation of the Act and thereby fails to effectuate its policies. Among other things the Act was designed to strengthen the unions in their dealings with the employers. The closed-shop proviso is an example. *But while the Act protects individual union mmebers from discriminatory discharge it strains the imagination to see where in the Act Congress has intended that discharges made pursuant to a valid union security contract should in themselves constitute an unfair labor practice. It would appear that the effect of this order is that the Board is seeking to protect a recalcitrant member from his union's discipline.*" (159 Fed. (2d) 526.) (Italics ours.)

It is submitted that the decision of the Court of Appeals for the Seventh Circuit properly and reasonably marks the limits of the statutory authority of the Board in its ruling that the Board exceeds its

powers when it attempts to protect a recalcitrant union member from his union's discipline. For these reasons we respectfully submit that the existing conflicts should be resolved by this Court in favor of the decision made in *Aluminum Co. of America v. N.L.R.B.*, supra.

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3. THE DECISION OF THE COURT OF APPEALS ESTABLISHES A PRECEDENT, WHICH IF ALLOWED TO STAND WILL PERMIT RECALCITRANT UNION MEMBERS TO DISRUPT AND UNSETTLE CONTRACTS DESIGNED TO STABILIZE LABOR-MANAGEMENT RELATIONSHIPS.

The decisions of the Court of Appeals in the instant case goes farther to sanction Board interference in Union affairs and in affording protection to recalcitrant union members who have flagrantly violated union rules and the provisions of labor-management contracts, than does its decision in *Local No. 2880 v. N.L.R.B.*, supra. The Court's opinion fails to mention, but it is undisputed, that the discharged employees resigned, en masse, from the CIO and that all of the employees, without exception, participated in a strike violative of the CIO's pledge. Thus, the Court's decision gives tacit approval to the proposition that employees may refuse to maintain membership in a union, though this be required as a condition of employment in a collective bargaining agreement, and that union members may disrupt their union and violate its rules, so long as they make plain and manifect their hostility to it, and engage in activities in favor of a rival organization. It is also the tacit de-

cision of the Court that under such circumstances the Board may interfere in matters of union discipline, probe union motives and penalize an employer if he has information that the union's motive in demanding the discharge of recalcitrant members *might* be reprisal for activities on behalf of a rival organization. It must be remembered that we do not have here a situation as in *Local No. 2880,* supra, where the only error or offense of the discharged employee was to assume that he could exercise the rights given to employees by the National Labor Relations Act without retaliation. Here the offenses of the discharged employees were real and violative of sound and patriotic union policy and of unimpeached and untainted contractual obligations.

The extension of the principle of the decision in *Local No. 2880,* supra, to the facts of this case makes it possible for the Board to interfere in labor-management relationships controlled by "closed shop" contracts entered into prior to the enactment of the Labor Management Relations Act, 1947,[12] and to intrude into

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[12] "• • • the provisions of section 8 (a) (2) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto."

Section 102, Labor Management Relations Act, 1947.

the internal affairs of unions contrary to the spirit and letter of the National Labor Relations Act.

This decision would also permit the Board to interfere with the rights preserved to unions by the Labor Management Relations Act, 1947. This Act does not impair the right of labor unions to secure the discharge of a union member, while he remains such a member, except in the single instance where the discharge is sought to discourage or encourage membership in a labor organization.

> "It would appear that there is nothing in the Act which makes it illegal for a union to request the discharge of a *union* member; Section 8 (b) (2) makes it illegal for a union 'to cause or attempt to cause an employer to discriminate against an employee * * * with respect to whom membership in such organization has been denied or terminated * * *' but contains no prohibition against seeking the discharge of one who is presently a union member. And the proviso to Section 8 (a) (3) apparently makes it proper for an employer to acquiesce in such a demand for discharge of a union member, where it is not 'to encourage or discourage membership in any labor organization' since the prohibition is directed at discrimination against an employee for non-membership in a labor organization. In other words, if a union feels that a member is a labor spy, or professionally incompetent, or disruptive of the union and the like, it seems that they may demand the discharge of such member *before* (but not after) expelling him from the union. And a strike for such a purpose would appear to be legal under Section 8 (b) (4) and Title III, Section 303 (a);

the specific proviso in Section 8 (b) (1) allowing a union to 'prescribe its own rules with respect to the acquisition or retention of membership' seems to preclude a claim that such a strike would be illegal under that section."

Van Arkel, "*An Analysis of the Labor Management Relations Act*, 1947, p. 31.

Under the present decision, the Board can interfere with the above outlined rights of unions preserved by the Labor Management Relations Act, 1947, if the recalcitrant union member before embarking on a campaign of sabotage and disruption manifests his hostility to the contracting union, and the Board finds that the employer has information that the union *might* be acting on reprisal for activities on behalf of a rival organization.

We submit, therefore, that the precedent established by the Court of Appeals' decision presents questions of great public importance affecting unions, their members and employers, which should be resolved by this Court.

Its decision also tacitly overrules two well established principles of law and presents another question which should be resolved by this Court. It is the general rule that a legal act, in this instance, the CIO action in disciplining members for gross violations of its rules, is not rendered actionable as a wrong by virtue of the intent with which it is done. (1 *Am. Jur., Actions,* Sec. 25, pp. 420-421.) It is also the general rule where there is no illegality in the making or per-

formance of a contract, as in this case, that the contract is enforceable even though the promisor knows that the performance thereof will incidentally assist the promisee to evade the law or public policy. (12 *Am. Jur.*, Sec. 155, pp. 648-649; 53 *A.L.R.* 1364, 1366.)

The petitioner, as the record makes evident, performed its agreement with the CIO in reliance on these two well established principles. The decision of the Court of Appeals permitting the petitioner to be penalized for acting in accordance with well established standards of law, therefore, presents the question whether the public policy of the United States, as expressed in the National Labor Relations Act and the Labor Management Relations Act, 1947, will be best served by discarding these principles in cases involving collective bargaining agreements and substituting therefor shifting and variable standards devised by the Board, which encourage industrial strife and impair and disturb relationship heretofore stabilized by labor-management contracts. We submit that this is another important question which should also be resolved by this Court.

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4. THE ORDER AND DECISION AFFIRMED BY THE COURT OF APPEALS DEFEATS THE PURPOSE OF THE NATIONAL LABOR RELATIONS ACT AND WILL NOT EFFECTUATE ITS POLICIES AND SHOULD, THEREFORE, BE SET ASIDE.

It is assumed, for the purposes of this portion of our argument, that the Board has power to regulate unions' indirectly and to interfere with their property rights.

Granting this premise, it is impossible to find a reasonable basis for the Board's order under the facts of this case.

As we know, the discharged employees all resigned from the CIO and they all participated in an unauthorized strike. The National Labor Relations Act and the Labor Management Relations Act, 1947, were both intended by Congress to eliminate to the fullest extent possible industrial strife and to stabilize management-labor relations.[13] The wilful conduct of the discharged employees, it must be conceded, was designed to defeat the intent of Congress. The provisions of both Acts are ample and sufficient to have brought about an orderly and peaceful settlement of the dispute, but the employees chose to resort to strife and disorder, and it should be noted, in this connection that the Board has, at no time, contended that the participation of the employees in an unauthorized strike did not furnish sufficient cause to the CIO to discipline them. We submit that, therefore, the order is not designed to effectuate the policies of the Act, and the decision of the Court of Appeals affirming it is in conflict with the following applicable decisions of this Court:

Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 83 L. Ed. 126;

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[13] "Moreover, the fundamental purpose of the Act is to protect commerce from interference and obstruction caused by industrial strife."

Consolidated Edison Co. v. N.L.R.B., supra, 305 U.S. 237, 85 L.Ed. 144.

N.L.R.B. v. Fansteel Metal Corp., 306 U.S. 247, 83 L. Ed. 627;
N.L.R.B. v. Southern Steamship Co., 316 U.S. 31, 86 L. Ed. 1246.

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5. THE COURT OF APPEALS FAILED TO REVIEW THE INSTANT CASE IN ACCORDANCE WITH STANDARDS PROMULGATED IN THE ADMINISTRATIVE PROCEDURE ACT AND THE LABOR MANAGEMENT RELATIONS ACT, 1947.

(a) The Court of Appeals did not review the record as a whole in determining whether the findings of the Board are supported by substantial evidence.

Section 10(e) of the Administrative Procedure Act (5 U.S.C.A. 1009(e))[14] provides, in part, as follows:

> "The reviewing court shall * * * hold unlawful and set aside agency * * * findings, and conclusions found to be * * * (5) unsupported by substantial evidence * * *. In making the foregoing determination, the court *shall* review the *whole* record or such portions thereof as may be cited by any party, * * *." (Italics ours.)

Section 10(f) of the Labor Management Relations Act, 1947 (29 U.S.C.A. 160(f)),[15] provides, in part, as follows:

> "The findings of the Board with respect to questions of fact *if* supported by substantial evidence on the record considered as a *whole* shall be conclusive." (Italics ours.)

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[14]Effective September 11, 1946.
[15]Effective June 23, 1947.

The history of the Labor Management Relations Act, 1947, shows that it was the intent of Congress to conform the review section of this statute to the corresponding section of the Administrative Procedure Act (Senate Report 105 on Labor Management Relations Act, 1947, pages 26-27).

The purpose of the provisions of the above quoted statutes is to require the reviewing Court at least to look at the evidence on both sides and see whether the evidence in support of the administrative finding or conclusion can fairly be regarded as substantial in the face of the evidence on the other side.[16]

The recital of facts contained in the opinion of the Court is notable for its brevity. It omits the facts which render the evidence offered by the Board in support of its findings unsubstantial, and thereby makes it evident that the Court of Appeals did not review this cause in accordance with the requirements of the above quoted statute.

The Court, as the opinion discloses, examined part of the record and decided that the evidence "abundantly supports" the Board's findings of ultimate facts that the CIO used the closed shop contract for the purpose of punishing the insurgents and that the Petitioner acceded to the discharge-demands of the CIO notwithstanding *it knew* the CIO had suspended the men in reprisal for activities on behalf of a rival organization (R. IV, 992).

[16]Federal Administra[illegible] Procedure Act, and the Administrative Agencies, Proceedi[illegible] of the Institute conducted by the New York University School of Law, pages 586-589.

The Court, however, failed to determine whether the evidence in support of the Board's finding of Petitioner's knowledge remained substantial in the background of the evidence showing the mass resignation of the employees from the CIO, their participation in the strike and the uncontradicted testimony of Petitioner's officers that they had not been able to arrive at a definite opinion with respect to the CIO's motivation (R. III, 736-738). In this connection it should be borne in mind that the Board requires knowledge of the contracting union's motivation, not perplexity or uncertainty, before applying the principle of the *Rutland Court Owners* case.[17]

The record presents a situation where reasonable minds appraising the same facts could differ on the question of the CIO's motivation, but the Board assumes that the Petitioner had knowledge because it had some information that the CIO *might* be acting in reprisal. In other words, the Board is punishing the Petitioner because it did not arrive at the same conclusions the Board did.

We submit, therefore, that the Board's evidence is not substantial when considered in relation to other evidence in the record. The Board's reasoning in arriving at its findings of ultimate fact also raises relevant questions of law which the Court did not resolve and in this respect the Court also failed to comply with the statutory requirements.

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[17] *Matter of Spicer Mfg. Corporation*, 70 N.L.R.B. 41, and *Matter of Diamond T Motor Car Company*, 64 N.L.R.B. 1225.

(b) The Court of Appeals did not decide all relevant questions of law.

The review section of the Administrative Procedure Act provides, in part, as follows:

> "So far as necessary to decision and where presented, the reviewing court *shall* decide *all relevant questions of law,* interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of any agency action." (5 U.S.C.A. 1009 (e)). (Italics ours.)

The above statute, not merely gives the reviewing Court the power, but it also places it under the obligation to "decide all relevant questions of law".

In Section 4 of our argument we raised the question whether the Board could hold that the CIO's lawful action in disciplining its members became unlawful because of a state of mind, and whether the petitioner could refuse to perform a lawful contract because it knew that such performance might incidentally assist the CIO to evade the law. The Court of Appeals did not decide this question.

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6. THE COURT OF APPEALS IN SUSTAINING CERTAIN ESSENTIAL FINDINGS OF FACT MADE BY THE BOARD MADE A DECISION IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

(a) One of the Board's essential findings is that the Petitioner had knowledge of the anti-CIO activity of the five stewards when it consented to their discharge (R. I, 70: 77).

There was no direct evidence as to this, but the Board inferred from the fact that the Petitioner consented to a "lay-off" of two hours to enable the employees to attend the initial meeting, that the Petitioner must have ascertained the "true" or anti-CIO purpose of the meeting. This, of course, is based on the invalid premise that employers in general, and the Petitioner in particular, always ascertain the true purpose of a meeting when time is granted therefor. But aside from the logical invalidity of this inference, there is an even stronger reason against the propriety of basing this finding on inference or on the Board's expertness in the field of labor relations. There were five persons, all of them witnesses at the hearing, from whom the Board could have elicited direct evidence, had it so desired, as to whether the Petitioner was told or ascertained the "true" purpose of the meeting, but it did not do so (R. I, 268-269). Under such circumstances, the Board cannot rely on inferences to sustain its finding and the decision of the Court of Appeals affirming it is in conflict with the applicable decisions of this Court.

Galloway v. U. S., 319 U.S. 372, 87 L. Ed. 1458.

(b) In ruling against Petitioner, the Board had to overcome the fact that the discharged employees' misconduct, independent of their permissible union activities, was of a character which justified their discharge, even under the Board's own understanding of the law (*National Linen Service Corp.*, 48 N.L.R.B. (F) 171, 204-205). In an attempt to overcome the obstacles presented by this fact, the Board made the conclu-

sionary finding that the petitioner "*made no 'bona fide' effort to evaluate all the evidence* before it when it allegedly decided, despite the CIO's failure to deny the obvious facts, to believe that the CIO was not acting in reprisal against the complainants because of their anti-CIO activity" (R. I, 79).

There is implicit in this finding of bad faith the assumption that the Petitioner knew that it had the duty to evaluate or appraise the evidence. This assumption is absurd and irrational because up to the time this case was decided, the Board had made no decision and had made no ruling which required an employer to appraise, weigh or evaluate evidence.[18] (R. I, 59 and Footnote 28; 62-63).

We submit that the decision of the Court of Appeals affirming this finding is in conflict with the applicable decisions of this Court.

Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 83 L. Ed. 126.

Dated, San Francisco, California,
April 1, 1949.

Respectfully submitted,
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[18] 31 *C.J.S.*, Evidence, Section 132, p. 760.